Thus, the Fourth Circuit's view as to the proper interpretation of the 1980 regulations is of limited practical import now.[4]

2. Petitioners also seek review of the question whether the court of appeals erred in holding that the CAA requires EPA to interpret the statutory term "modification" consistently in its PSD and NSPS regulations. Petitioners identify no square conflict between the Fourth Circuit's statutory holding and the holding of any other court of appeals. In particular, although petitioners identify decisions that are in tension with the Fourth Circuit's decision, none addressed the particular theory of statutory interpretation that the Fourth Circuit adopted. For instance, in its recent decision in *New York* v. *EPA*, *supra*, the D.C. Circuit rejected the argument that Congress in 1977 incorporated then-existing NSPS regulations into the PSD statutory provisions but found that the parties had waived the argument that the CAA required EPA to use the same definition of "modification" under both regulatory programs. 413 F.3d at 19-20; see *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400-402 (D.C. Cir. 1979) (allowing different emissions "increase" tests in PSD and NSPS without directly addressing the theory of statutory interpretation adopted by the Fourth Circuit).

Petitioners also argue (Pet. 27-29) that the Fourth Circuit's statutory holding is exceptionally important, and they emphasize that EPA referred to the court of appeals' decision in recently proposing new NSR rules for electric generating units that would establish a test for measuring emissions increases similar to the NSPS test. See 70 Fed. Reg. at 61,083.

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[4] Petitioners contend that the Fourth Circuit's interpretation of the 1980 PSD regulations is "contrary to analysis" in decisions by other courts of appeals (Pet. 19), but not that it conflicts with any other court's holdings. The decisions that petitioners cite do not address the particular question of statutory interpretation that the Fourth Circuit found controlling.

EPA made clear that, while it "continue[s] to respectfully disagree with the Fourth Circuit's decision" in this case and "continue[s] to believe that [it] ha[s] the authority to define "modification" differently in the NSPS and NSR programs," it "believe[s] that [proposing a set of revised rules] is an appropriate exercise of [its] discretion." *Id.* at 61,083 n.3.[5] Far from indicating that this Court's review is necessary, the fact that EPA has proposed new regulations indicates that the agency believes it can address any difficulties caused by the court of appeals' decision through rulemaking, and obviates any need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREER S. GOLDMAN
TODD S. KIM
Attorneys

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[5] For purposes of the proposed rulemaking, EPA noted the relevance of "the substantial emissions reductions from other CAA requirements that are more efficient than major NSR," and it also noted that "[t]he current major NSR approach discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways," practices that do "not advance the central policy goals of the major NSR program." 70 Fed. Reg. at 61,083. EPA stated that "[t]he central policy goal is not to limit productive capacity of major stationary sources, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so." *Ibid.*

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT DUKE ENERGY CORPORATION IN OPPOSITION

PAUL R. TOURANGEAU
GARRY S. RICE
DUKE ENERGY CORPORATION
Legal Department
526 South Church Street,
EC03T
Charlotte, NC 28242
(704) 382-8111

DEAN M. MOESSER
DUKE ENERGY CORPORATION
5400 Westheimer Court
Houston, TX 77056-5310
(713) 627-5298

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
MARK B. BIERBOWER
MAKRAM B. JABER
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

T. THOMAS COTTINGHAM, III
NASH E. LONG, III
HUNTON & WILLIAMS LLP
101 South Tryon Street,
Suite 3500
Charlotte, NC 28280
(704) 378-4700

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Duke Energy Corporation states that it has no parent company and that no publicly held company owns 10% or more of its stock.

Duke Energy has announced its intention to merge with Cinergy Corporation. Cinergy has no parent company and no publicly held company owns 10% or more of its stock.

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39 Fed. Reg. 36,946 (Oct. 15, 1974) 4

39 Fed. Reg. 42,510 (Dec. 5, 1974) 5

40 Fed. Reg. 58,416 (Dec. 16, 1975) 4

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69 Fed. Reg. 23,951 (Apr. 30, 2004) 20

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70 Fed. Reg. 61,081 (Oct. 20, 2005) 23

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S. Rep. No. 91-1196 (1970), *reprinted in* Legal Compilation: Statutes and Legislative History, EPA (1973) 3

INTRODUCTION

In this Clean Air Act ("CAA") enforcement action, the U.S. Environmental Protection Agency ("EPA") and Petitioners (Intervenors below) allege that long-ago completed repair and replacement projects at Duke Energy Corporation's existing power plants violated the 1980 Prevention of Significant Deterioration ("PSD") rules. The district court and the Fourth Circuit had before them three interpretations of these rules, each of which had been advanced *by EPA* itself at some point in this program's lengthy regulatory history. The Fourth Circuit rejected EPA's enforcement interpretation, and affirmed the district court's application of EPA's contemporaneous interpretation of the 1980 rules. This case is not worthy of review.

First, there is no conflict between the court's construction of the rules and those of other courts of appeals. The district court's construction, which the Fourth Circuit affirmed, in fact relied on the Seventh Circuit's decision that Petitioners claim presents a conflict,[1] and the D.C. Circuit explicitly declined to review EPA's interpretation of the 1980 rules.[2] Nor does the court's statutory construction present a conflict. The only other court squarely presented with the particular statutory construction issue that the Fourth Circuit resolved flatly refused to "express [any] opinion" as to that construction.[3]

Second, the issues addressed by the Fourth Circuit are squarely before lower courts in other circuits in pending cases involving similar projects at existing utility units. Accordingly, there is no current conflict among the circuits, and it would be premature for this Court to consider the questions at issue here before they have worked their way through the lower courts. Given this, it is not surprising that the principal plaintiff below – the Government – did not seek certiorari.

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[1] *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).

[2] *New York v. EPA*, 413 F.3d 3, 21 (D.C. Cir. 2005).

[3] *Id.* at 20.

Third, Petitioners' jurisdictional point does not warrant review. The Fourth Circuit did *not* invalidate the rule and thus did not "invade" the jurisdiction of the D.C. Circuit. The court reviewed the interpretation of the rules asserted by EPA in an enforcement action brought by EPA in the Middle District of North Carolina. The principle of regulatory construction applied by the Fourth Circuit to determine the meaning of the 1980 rules is well established: an interpretation of a rule that is inconsistent with the statute is entitled to no deference. For this reason, the court rejected EPA's enforcement interpretation of the 1980 rules and affirmed the district court's application of EPA's own contemporaneous construction of those rules.

There is no conflict among the circuits as to whether an agency's interpretation of a CAA rule is subject to review in an enforcement action. In fact, the circuit courts that considered a similar issue reached the same conclusion as the Fourth Circuit here. In addition, the basis of Petitioners' jurisdictional argument is their disagreement with the merits of the court's decision. As discussed above, Petitioners' mere disagreement with the EPA construction of the rules adopted by the court does not warrant review.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

This case involves the application of rules promulgated 25 years ago (1980 PSD rules) pursuant to statutory provisions enacted 28 years ago (1977 CAA Amendments), which incorporated statutory definitions enacted 35 years ago (1970 CAA Amendments). An understanding of the more than 30-year statutory and regulatory history of new source programs is essential to the review of the petition in this case.

A. Existing Source Programs.

Congress in 1970 directed EPA to develop National Ambient Air Quality Standards ("NAAQS") to protect the